Religious Freedom, LGBT Rights, and the Prospects for Common Ground

Edited by

WILLIAM N. ESKRIDGE, JR.
Yale University

ROBIN FRETWELL WILSON
University of Illinois Urbana-Champaign
I am a Westerner. In my part of the world, mountains are high, mesas are long, and debates over the use of publicly owned land are elevated to questions of ultimate truth. One side believes God created the earth for mankind’s uses: wise stewardship is required, but the resources should bless God’s children. The other side believes the lands themselves are sacred and seeks to protect them as wilderness “untrammeled by man.” Both sides profess to love the land, but both hold very different views of how to express their reverence.

This debate was crisply captured by bumper stickers I saw on two cars side-by-side in an intersection. One bumper sticker said, “Earth first. We’ll mine the other planets later.” The other bumper sticker read, “Save the Earth. Kill yourself.”

I was not sure if those two extremes were intended as arguments or as parody. Either way, these two bumper stickers illustrate the way public policy debates are conducted in our adversarial system of democracy. Both sides present a binary choice between good and evil. This chapter argues that where faith and sexuality intersect in public policy, such binary choices are not only unnecessary but destructive. It discusses five conditions that together can yield shared-space solutions to the seemingly intractable conflict between religious freedom and LGBT rights.

I SHARED SPACES

The ongoing debate between LGBT advocates and those who defend religious freedom is too often conducted in the same binary fashion as those bumper stickers. LGBT-rights advocates argue that religious freedom is simply an excuse to

1 Kevin Proescholdt, *Untrammelled Wilderness*, 61 Minn. History 114 (Fall 2008), https://perma.cc/7AMG-NWMC.
2 Marc D. Goldfinger, *Earth First!: A Brief History*, https://perma.cc/7AMG-NWMC.
discriminate against LGBT people. At the extreme, those who defend religious freedom declare that sexual identity deserves no legal protection whereas the exercise of religion deserves maximal protection.

This pattern is not unique to debates over public lands or LGBT rights. Debating issues at the extremes is characteristic of American democracy. Pick any set of controversial issues related to what we value, protect, or prioritize and this proves to be true. For example, in the immigration debate, discussions of reproductive freedom, and even matters related to science like climate change, the discussion starts at ideological extremes. In time, the messy, contentious, and sometimes inefficient process we know and love as democracy results in finding a shared space that accommodates diverse opinions and needs.

These tensions are part of the human experience. As Americans, we have learned to deal with these situations. We have been doing it – sometimes more successfully than others – but in the end always striving to find a way to live together peaceably. This is one of the core characteristics of America. We find workable solutions to accommodate people of extremely diverse backgrounds, beliefs, and needs. Had we not succeeded, the United States would no longer exist. Indeed, that is the unique genius of America.

Much of the solution to these tensions lies in the American notion of pluralism. Fundamental disagreements can exist among intelligent, informed people of good will. Whether the issue involves our use of land or finding the balance between LGBT rights and religious freedom, America needs an approach that to the maximum extent possible allows space for all people to live according to their fundamental beliefs and needs. America needs an approach that finds the shared spaces, resolving conflicts that may arise with win-win solutions that are not dependent on demands for ideological purity.

Such solutions come from taking tangible first steps. In September 1993, I was in Washington DC with a morning meeting at the White House. The night before, I received a call notifying me that the meeting had been cancelled. Secret negotiations between the government of Israel and the Palestine Liberation Organization (PLO) had concluded and a signing ceremony had preempted the meeting. Because I had flown from Utah to DC, the caller invited my wife and me to attend.

The event took place on the South Lawn of the White House. A large audience had assembled, including several hundred members of the media from around the world. A lone table and a simple podium stood on a small platform with the White House as its backdrop. This was a profound moment in history. The Jews and Palestinians had for centuries fought over land they both occupied and both viewed as holy, but for different reasons. Finally, they had agreed to what would be known as the Oslo Accords. This was not a full solution, but it was a step toward a long-term

Despite the pageantry of the moment, the sound of chanting protestors on both sides of the agreement could be heard from across the street in Lafayette Park. Helicopters hovered overhead as part of the unprecedented security arrangements required when world leaders assemble.

Finally, the door to the South Portico of the White House opened and three men with serious faces emerged. It was a surreal moment. There they were, Yitzhak Rabin, prime minister of Israel on the left; Bill Clinton, president of the United States in the middle; and Yasser Arafat, chairman of the PLO, on the right.

Prime Minister Rabin spoke deliberately and soberly: “We are soldiers who have returned from battle stained with blood,” he said. “We who have fought against you, the Palestinians, we say to you today, in a loud and clear voice: Enough of blood and tears. Enough!” Then, dressed in his familiar Arab head scarf, Chairman Arafat spoke in Arabic. He referenced the hopefulness of people on both sides that this conflict would end and concluded by saying, “It is time to give peace a chance.”

Documents were signed and the world held its breath, waiting to see if these men, bitter enemies for decades, would shake hands. In great symbolism, President Clinton stood with arms outstretched as if to nudge them closer. They paused, looked one another in the eye, and shook hands. It was a magical moment.

While the moment was magical, the process of getting to this modest step forward was not magic. Endurance, long suffering, and the sobering reality that brute force was not producing the result either side desired brought them to the moment. Both knew a perpetual continuation of the hostilities came at great cost, in both blood and treasure. Their agreement represented a small step but it produced hope. Since then, hope has ebbed and flowed. Still, history must admire Rabin and Arafat for what Clinton called their “brave gamble.”

II A BRAVE GAMBLE

A brave gamble took place in 2015 when the LGBT and faith communities mutually worked for passage of what is now known as the Utah Compromise. Representatives of both groups met repeatedly, honestly seeking to understand one another. Though the discussions involved tension and disagreement, the two sides were held together by strong conveners and a commonly defined objective. They sought fairness, not unilateral advantage. All the traditional points of view were present. There were


6 Aaron David Miller, Oslo Stakeholders Reflect on Peace Process After 20 Years, Al Jazeera Am. (Sept. 12, 2013), https://perma.cc/7E8J-RWHH.
naysayers on both sides who worried about giving an inch in their traditional battle of extreme points of view.

In the end, legislation passed in a deeply red state that extended protection against discrimination in housing and employment for LGBT people while also protecting the capacity of churches and critical auxiliary organizations to carry out their essential missions and doctrines.\textsuperscript{7} Predictably, the outcome was praised by a large majority of people and criticized by advocates at both extremes who thought the Utah Compromise gave up too much ground. The doubting extremes on both sides said it was not replicable elsewhere.

A few weeks later I participated in a thoughtful discussion at the Brookings Institution in Washington DC, which was organized to analyze the Utah Compromise.\textsuperscript{8} Afterward, I joined a small group for dinner at a Georgetown restaurant. The dinner group included a national LGBT rights leader and one of the religious leaders who had played a significant role in brokering the Utah compromise. During the after-dinner discussion, I asked whether successful passage of the Utah Compromise could be used as a template for action elsewhere in the United States. Various opinions were expressed. The religious leader offered an observation and a pivotal question. The observation was that Utah is a conservative state with a strong religious community.\textsuperscript{9} He spoke of the resistance the bill had from the faith community and that the bill passed because leaders of the faith community moved forward in the face of that criticism. He said, “The bill passed because leaders of the faith community fought hard for LGBT rights.” He then turned to the LGBT advocate and asked, “The real question now is whether in a different setting you would fight for our rights?”

The LGBT advocate is a lawyer, a senior officer of a well-known national LGBT group. The advocate paused thoughtfully before speaking. “Under the right circumstances, I think we could.”

What are the circumstances where advocates for religious freedom and LGBT rights could advocate for a shared-space solution? What needs to occur for those conditions to exist? The years I have worked in public policy making cause me to believe there are five conditions that must exist for a shared-space solution to emerge in politics: common pain, a shared belief, political equilibrium, skilled conveners, and, finally, simultaneous benefit.

\textsuperscript{7} For details, see Adams, Chapter 32.
\textsuperscript{9} At the time of passage, Utah was the single most conservative state in the nation, measured by voting in the prior presidential election, and the second most religious, measured by self-identified religiosity. See Robin Fretwell Wilson, Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections, 64 CASE W. RES. L. REV. 1161 (2014).
A Condition 1: Common Pain

The treaty I witnessed on the South Lawn of the White House came about when Israel and the PLO, each for its own reasons, became motivated to find a solution. Each, for different reasons, felt the pain of generations of bitterness and bloodshed. They used different, but complementary, words to express their pain. Rabin used the words “Enough of blood and tears. Enough!” Arafat’s expression, “It’s time to give peace a chance,” made clear he and his people were ready for a solution. While both undoubtedly had strategic reasons to engage and neither was ready to give up, they both concluded that their attempts to use brute force to get their way were not working and their people were suffering as a result.

In Utah, the LGBT community had tried unsuccessfully for years to pass non-discrimination legislation. At the same time, the protectors of religious freedom in Utah could see threats on the horizon and wanted clarity in the law to provide the protections required to ensure they could exercise their faith freely. As talks matured, it became apparent that the protectors of religious freedom were also interested in eliminating discrimination, and that LGBT rights advocates really did not want to eliminate religious freedom.

In both these cases, while their pain was different, both sides felt the anxiety of uncertainty. Both sides had other priorities requiring attention. Each side independently concluded that “under the right conditions” they could benefit from a shared-space solution. This opened a window of opportunity in which both sides were willing to consider making a brave gamble that could meet most of their individual objectives.  

B Condition 2: A Shared Belief

Resolution between factions always starts with a human connection – some component of commonality. Make no mistake, this does not have to include friendship or trust, rather it can be just a glimpse, a whiff, a faint taste of common thought. Judging from their body language that day on the South Lawn of the White House, Rabin and Arafat hated each other, but the common thought was that only bad things were coming from their centuries’ old battle. It was the smallest of threads, but enough that skilled conveners could use it to slowly knit the fabric of agreement.

The Utah Compromise did not resolve all the issues between the LGBT community and religious freedom advocates. Not even close. However, in contrast to the Palestinian-Israeli conflict, over time real respect and friendships developed. Most importantly, the two groups came to understand that both sides supported basic

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10 For an argument that this is possible in all but the hardest cases, see Laycock, Chapter 3.
11 As one example, it did not reach public accommodations. See Laycock, Chapter 3; Pizer, Chapter 29; Adams, Chapter 32.
fairness – fairness for all. The realization of that common view provided conveners the ability to slowly build a small platform of agreement.

**C Condition 3: Political Equilibrium**

It would be naïve to believe that conflicts as complex as those mentioned in this chapter could be solved by persuasion alone. Struggles over rights – especially those connected to identity – are fierce political and cultural battles that often cause people in other settings to resort to violence and war. Here, people on both sides of the issue view the outcome as vital to their survival and well-being and to the shape of our culture in the future.

It was General Carl von Clausewitz, a nineteenth-century military theorist, who said, “War is a mere continuation of policy (politics) by other means.” My experience in politics causes me to believe one can reverse von Clausewitz’s observation and it remains true. Politics is war by other means.

Von Clausewitz taught that war is fought not just to prevail in one’s objectives, but also to render the adversary incapable of resisting. “War therefore is an act of violence intended to compel our opponent to fulfill our will,” he said. In other words, if either side believes that it has a sustainable advantage, there is no incentive to settling for less than everything. Shared-space solutions are rarely achieved on the strength of goodwill alone. If either Arafat or Rabin had been convinced that continued use of brute force would have produced a unilateral victory, the Oslo Accord ceremony I watched would have never occurred. It was the sustained existence of unacceptable, painful equilibrium that made the deal possible. This is true in nearly all negotiations and disputes and so it is in politics.

Von Clausewitz’s theories of war describe well the political objectives of each warring party in the LGBT rights and religious freedom conflict. Both sides hire professionals and build organizations with a singular mission – to mold the culture and shape government statutes that best protect their interest and limit their adversary’s. Hundreds of millions of dollars are spent each year as both sides seek unilateral victory. This is a political struggle and, like war, it will stop only if one side succeeds in eliminating the capacity of the other to resist, unless there is a moment when both sides feel roughly equivalent levels of risk and potential reward. Those are moments when shared-space solutions can emerge.

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12 Carl Von Clausewitz, Vom Krieg (J. Graham trans., 1832), https://perma.cc/QUB-7-SMGR.
13 *Id.*
14 For an estimate of spending by LGBT advocates, see Ryan Anderson, Chapter 27 (estimating $500 million by a single donor alone). By contrast, Alliance Defending Freedom received a tenth of that amount in annual contributions, or about $50 million. See Form 990 for 2015, https://perma.cc/5T2G-FAX6.
D Condition 4: Skilled Conveners

It is worth remembering that the United States of America is the product of a brave gamble facilitated by great conveners. In the early 1780s, our country was made up of thirteen very separate and independent colonies operating as a group of loosely aligned states.\(^{15}\) This arrangement was memorialized under an agreement known as the Articles of Confederation.\(^{16}\) It was a mess. However, finding a resolution to the problem was extraordinarily difficult because the colonies were deeply divided about the nature and role of government.

Many of the leaders and their constituents believed a central national government was required to maintain order and other necessary components of a successful society. Others, having just extricated themselves though a costly revolutionary war from the king of England, wanted nothing to do with a strong national government. The two parties were loath to speak with each other.

James Madison went to the only person in the Americas capable of convening the two sides, General George Washington, who had led the fledgling nation in gaining its independence.\(^{17}\) He told Washington his attendance would attract political leaders from other states, who would join a constitutional convention out of respect for him.\(^{18}\) He was right. Though the story is more complicated, it was Washington’s convening power that set the stage for the Constitutional Convention in Philadelphia that produced the shared-space solution between those who supported and those who opposed a national government.

Leaders of Norway and other world powers convened the parties required to produce the Oslo Accords. The tenacity of a group of insightful community leaders and legislators lead to the Utah Compromise.

Shared-space solutions start with skilled conveners who do far more than issue invitations based on their stature. They bring the judgment to know when windows of opportunity present themselves. The conveners must have sufficient stature that the parties will listen to and have some degree of trust in them. Once discussions start, the conveners act as diplomats, counselors, problem-solvers, and healers. Warring parties always need help finding a shared solution. Conveners are peacemakers.

E Condition 5: Simultaneous Benefit

Both the Utah Compromise and the Oslo Accords recognized the need for both sides to receive definable benefits under the agreement simultaneously. The Oslo


\(^{16}\) Id.


\(^{18}\) Id. at 520–27.
Accords detailed a series of activities each side committed to accomplish, contingent on the successful completion of the other parties’ tasks.19

The Utah Compromise came during a period when religious freedom bills were being considered in other states. One year before, in 2014, Arizona’s governor vetoed a bill to amend its state Religious Freedom Restoration Act (RFRA),20 which attracted fierce criticism despite close similarities with the federal RFRA Congress passed with overwhelming bipartisan support in 1993.21 Arizona’s legislature enacted the bill on party line votes with virtually no public debate.22 The legislators who voted for the bill and the governor who ultimately vetoed it were vigorously attacked, and out-of-state businesses threatened economic boycotts.23

Equally controversial was Indiana’s RFRA, enacted only two weeks after the Utah Compromise.24 It attracted numerous boycotts, beginning with Salesforce, which announced an end to its business expansion in Indiana.25 Soon after, Arkansas enacted a RFRA of its own that closely mirrored the federal RFRA.26 These state laws and those who passed them were accused of hostility and hatred toward LGBT people.27

By contrast, the Utah Compromise extended important new protections simultaneously for both the faith community and the LGBT community. The protections for religious freedom were far more consequential than those in the failed legislation in Arizona, as Professor Douglas Laycock explains elsewhere in this volume.28 Likewise, the LGBT community was granted important new protections it had sought unsuccessfully for years.29 Because protections were secured through negotiation among the parties and emerged from a process that simultaneously yielded significant new legislative projections for both groups, the bill was embraced and


20 S.B. 1026 (Ariz. 2014).


23 See Fernanda Santos, Arizona Governor Vetoes Bill on Refusal of Service to Gays, N.Y. TIMES (Feb. 26, 2014).


28 See Laycock, Chapter 3 (reviewing RFRA’s track record when invoked against nondiscrimination laws).

29 For that history, see Adams, Chapter 32.
celebrated as progress for both parties. Brave gambles require the potential of simultaneous benefits for both parties.

### III FINDING A BRAVE GAMBLE

The musical *Hamilton* chronicles the life of Alexander Hamilton in toe-tapping rap cadence. This includes a depiction of Hamilton’s famous pistol duel with then vice president of the United States, Aaron Burr, with whom Hamilton had had a long-running personal rivalry. It was their own private war, elegantly illustrating von Clausewitz’s point that the primary objective of war (and, by extension, politics) is not only to impose one’s will on an adversary, but to eliminate the capacity to rebound.

Despite the rhythm and clever rhyme of the rap, as the fateful moment approaches, the insanity of this moment blares more loudly than the music or clever lyrics. A man sitting next to me uttered, to himself, “Somebody should have stopped this.” Yet Hamilton’s and Burr’s friends not only stood by while this happened, they participated by facilitating it.

One can only imagine the after-the-fact guilt and remorse. Hamilton was dead. Burr’s career was ruined. There were no winners and it did not need to happen. No one was willing to walk into that shared space to make the brave gamble of saying “Stop!”

Nationally, the religious freedom and LGBT rights clash resembles hundreds of individual duels. Bills are filed in state legislatures, ordinances are proposed before local governments, and litigation specialists on both sides file lawsuits with one thing in common, promoting their side’s purposes and silencing the other side. Each is a standoff – a duel not unlike the one between Hamilton and Burr. In the same way that battles combine into wars, political duels form a national culture. In aggregate and over time, if either religious freedom or LGBT rights are silenced, advocates will claim victory, but the United States will have lost.

Here is the common ground: to build their cases, both groups depend on a fundamental freedom referred to as moral agency – the ability to choose right from

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34 For a review of bills and lawsuits, see Melling, Chapter 19; Hollman, Chapter 23; Ryan Anderson, Chapter 27; Pizer, Chapter 29.
wrong and to act for ourselves.\textsuperscript{35} A fundamental doctrine of The Church of Jesus Christ of Latter-day Saints, often referred to as the Mormon Church, of which I am a member, is that moral agency is the inalienable human right to follow one’s own conscience. Moral agency does not create an entitlement to steal or murder or lie because one’s conscience tolerates it. We create governments to restrain crime and even punish guilt when that occurs. However, neither governments nor the people that form them have the right to suppress the conscience of another human being.\textsuperscript{36} Our world includes such a wide diversity of human needs and experience that a peaceful world could not exist otherwise.

Whether taught by philosopher or prophet, moral agency is the foundation of a civil society. Simply stated, the shared space between LGBT rights and religious freedoms does not reside at either extreme, but rather at the center.

When an LGBT person asks to be protected from discrimination because of who they love, or the gender they identify with, that claim is based on moral agency. Their plea is for fairness. Likewise, when people expect the right to exercise their faith, or the right not to be religious, they too are acting from their moral agency and petitioning for fairness. As Elder Von G. Keetch noted during the conference that preceded this book, moral agency also includes the right of all people – including LGBT persons – to live according to their core beliefs to the greatest extent reasonably possible.\textsuperscript{37}

In the struggles between LGBT rights and religious freedom, the shared space is to be found in a robust pluralism that ensures fairness – fairness for all.

To a person who is gay, lesbian, bisexual, or transgender, fairness for all includes protection from being denied a livelihood, a place to live, or basic services just because of who they are. To the religious adherent, fairness for all means the free exercise of religion, including the right to freely associate with fellow believers. That right cannot be absolute everywhere, to be sure, but there are many important spheres where it must be vigorously protected or religious freedom becomes meaningless.

This latter point deserves careful reflection, for it is often misunderstood. While some conceive of religion as merely a private belief system, most experience faith and God in the company and communion of fellow believers, as Michael A. Helfand explains elsewhere in this volume (Chapter 11). The right of religious

\textsuperscript{35} \textit{Agency}, The Church of Jesus Christ of Latter-day Saints (Apr. 24, 2017), https://perma.cc/W2PF-QBJ.

\textsuperscript{36} The Church of Jesus Christ of Latter-Day Saints: Doctrine and Covenants 134:4 (“[W]e do not believe that human law has a right to interfere in prescribing rules of worship to bind the consciences of men, nor dictate forms for public or private devotion; that the civil magistrate should restrain crime, but never control conscience; should punish guilt, but never suppress the freedom of the soul.”). For a similar argument from the Roman Catholic tradition, see Lori, Chapter 13.

\textsuperscript{37} Elder Von G. Keetch, Executive Director of the Public Affairs Department, The Church of Jesus Christ of Latter-Day Saints, Yale University (Jan. 20, 2017). See Chapter 14.
people to gather and associate with fellow believers who live the same faith is essential to religious freedom. Without that, for most religious communities, there is no meaningful religious freedom. Faith communities must have wide autonomy to order their religious affairs, not only with respect to core worshipping activities but also with respect to employment, religious schools, religious charities, and other areas vital to their ability to perpetuate their faith and carry out their religious missions.38 The unencumbered process of religious self-definition lies at the heart of religion itself and religious freedom. To label the fundamental need and right of religious people to gather and build institutions of community and meaning as merely “discrimination” does a serious injustice to people of faith, as Elder Von Keetch emphasized at the conference whose presentations became this book.39

As we interact with each other in shared spaces, there must, of necessity, be more give and take, more willingness to compromise, more searching for ways to accommodate diverse needs in a pluralistic society. That accommodation must run both ways, benefiting LGBT and religious freedom.

Can LGBT advocates and religious freedom defenders find alignment in their view of fairness? Can legislative bodies, courts, and administrative policy makers find the right words to achieve fairness to all? The answer is yes, so long as the objective is to find the shared space proceeding from the foundational principle of moral agency – the protection of conscience.

Elections are won using simple, big, ideologically crisp themes. However, once in the legislative process, compromises generally have to be made to actually get something done. An unwillingness to engage in legislative compromise usually means that nothing happens.

Close observers of political power know that among the most commonly repeated mistakes in politics is overreach. When a party or group gains power, after having been out of power for a time, they feel compelled to take advantage of the moment to deliver their mandate.

Overreach inevitably comes at the expense of the minority that was defeated in the recent election or that ends up in the losing position in a specific struggle for an objective. Resentment results and a backlash creates an appetite for retaliation. Ultimately, the aggrieved achieve power and restart the cycle of overreach. True, in some cases, each iteration of power gets closer to a shared-space solution, but other times it results in prolonged conflict, discrimination, pain, and sometimes outright war.

38 For elaboration in these spheres, see Helfand, Chapter 11; Leith Anderson, Chapter 12; Lori, Chapter 13; Berg, Chapter 24; Hoogstra et al., Chapter 25; Hill, Chapter 26.
39 Keetch, supra note 37 (critiquing statements made in connection with the release of U.S. Comm’n on Civil Rights, Peaceful Coexistence: Reconciling Nondiscrimination Principles With Civil Liberties (2016), https://perma.cc/XLV6-63ET (statement of Chairman Martin Castro)).
Those who seek to decide the debate between LGBT rights and religious freedom by silencing the other side will not only fail but do a terrible disservice to America’s culture and the fabric of civility and good will that still binds us despite deep differences. Just as the duel between Hamilton and Burr ranks among the most pointless episodes in US history, it would be equally pointless to resolve the conflict between religious freedom and LGBT rights through socially enforced censorship.

In the world of politics and public policy, clarity occasionally replaces chaos, statesmanship overcomes selfishness, compromise displaces gridlock. The reality is, such moments occur when brute force has failed and everyone involved senses that defeat is a real possibility; fatigue and fear give birth to decency and the mutual respect needed to give as well as get. Despite shrill voices, I sense we are getting closer to that point in the LGBT rights and religious-liberty standoff, for it is clear neither side can simply impose its will at an acceptable cost. When that moment comes, those who seek a just peace – those who seek fairness for all – should be ready to take the following concrete steps.

First, solution seekers on both sides must start by finding a common rhetorical platform or shared language upon which agreement can be built. Second, they must seize the collaborative moment when it arrives. Third, they must find conveners of stature to bring the sides together. Fourth, they must find incremental avenues of progress to build momentum and trust. Finally, they must undertake simultaneous action to protect both sides.

A Shared Language

Shared space requires shared language. In the 1980s, after decades of hardline communist thinking, Mikail Gorbachev led the Soviet Union in a new direction and described his economic and political reform using one word, “Perestroika.” It meant “to open up.” While such an endeavor involves endless complexity and nuance, the use of a simple word allowed him to gain widespread buy-in for a historic change.

While most people believe in LGBT equality and the importance of religious freedom, there is not yet the language to express a shared space where both communities are protected. This is where the phrase “fairness for all” serves an important purpose. It speaks clearly and unambiguously of a shared objective that both the LGBT and faith community want – to be treated fairly.


For polls on both sets of views, see Brownstein, Chapter 2; Laycock, Chapter 3; Greenawalt, Chapter 8.
B The Collaborative Moment

The creation of shared space for religious freedom and LGBT rights requires peacemakers to seize the collaborative moment – the moment when the opportunity for cooperation and compromise among these often divided communities appears. The recipe for success in the bone-on-bone world of democratic advocacy involves both self-interest and goodwill, but not in equal parts. When victory seems certain, goodwill among advocates is scarce. However, the risks of uncertainty generate the goodwill required for a collaborative solution. Storied diplomat Henry Kissinger once remarked that “the absence of alternatives clears the mind marvelously.” 42 Like courtroom litigants, advocates become open to a collaborative solution when they sense the possibility of defeat. It is uncertainty that often produces a transformative moment when agreement can be reached. When uncertainty for both sides around an issue becomes high enough, realism gels and both sides feel sufficiently vulnerable to allow for a collaborative moment. The shared space is found and a permanent, sustainable solution unfolds. When moments like this occur, they must be embraced.

In the LGBT and religious liberty standoff, those moments open and close in different ways and at different times depending on the context. It takes a discerning eye to recognize such a moment. Congress is different than state legislatures, and each state is unique. In Utah, the moment came in early 2015 after years of relationship- and trust-building efforts between the religious and LGBT communities – combined with the uncertainty of the Supreme Court’s impending gay-marriage decision. This atmosphere produced a mutual desire to reach a sustainable compromise despite the certainty that it would not be perfect for either side.

Similar discussions are being held, often quietly below the radar, in many other states. They are most productive when they are organic and arise from a shared interest in building a community that works for everyone, rather than the product of national advocacy groups seeking ideological purity. It is also vital that prominent legislative leaders from both sides of aisle become personally invested in the process and over time educate their colleagues.

Congress is more difficult, but the process is similar: shared need, strong relationships and trust built over time, prominent legislative stakeholders from both political parties, and ideological flexibility. At this writing, it is less clear when the moment in Congress will open, but I am certain it eventually will. Both sides have too much to lose and uncertainty is growing.

C Conveners of Stature

When the collaborative moment comes, it will take astute conveners to recognize it and seize it. In Utah, those conveners included Equality Utah and the LDS Church.

Equality Utah had worked for years to lay the groundwork for a common-ground solution but could not overcome the inherent resistance of a religiously conservative state. Church representatives had been meeting privately for years with members of the LGBT community to better understand their needs and explore ways to address them while preserving the freedom of religious organizations and individuals to live out their traditional religious beliefs regarding marriage, family, gender, and sexuality. Both sides recognized in the uncertainty before Obergefell a moment to act for good of all.

Then the Church took the unprecedented step of holding a press conference with some of its most senior religious leaders to announce Church support for legislation that would take a balanced approach to the issue.\(^{43}\) That act transformed the possibility of a collaborative moment into a reality, altering both cultural and legislative realities in Utah. On its side, Equality Utah courageously urged often-skeptical local and national groups to embrace the process, work for the best outcome, avoid explosive denunciations, and not let the perfect be the enemy of the good. The result changed Utah for the better.

Other states and Congress must find their conveners of stature – their senior statesmen and trusted institutions willing to risk reputation, support, friendships, and funding to seize the best moment to make a good enough, sustainable peace. Those who seek fairness for all have an urgent need to find their General Washingtons who are willing to take personal risks and lead the community to a higher good.

\(\text{D} \quad \text{Avenues for Incremental Progress}\)

In deciding how to approach the multidimensional conflicts between religious freedom and LGBT rights, experience teaches the value of moving in small steps. While there are certainly exceptions, sound public policy is rarely implemented through large-scale enactments, but rather through incremental progress, slowly building momentum until there is directional clarity. A single law, a single court decision, a single election will not resolve the controversy between religious freedom and LGBT rights. But the combined effect of many small steps toward mutual understanding and meaningful compromise can result in a change of direction that makes overall resolution possible.

Fairness for all invites policy makers to identify new venues for progress. Rather than belaboring the problem of wedding vendors, for instance, both sides might explore other venues of progress that hold the promise of cultivating closer working relationships among the contending parties as well as a healthier, more tolerant civic culture. Hospital visitation rights for same-sex couples might be one area of easy

\(\text{\footnotesize 43} \quad \text{See Adams, Chapter 32, for details.}\)
agreement. Another might be enhancing public services for at-risk LGBT youth. Even small areas of agreement like these can build momentum for progress. Cooperation that leads to success in small areas lays the foundation for further cooperation that may lead to success in more significant areas. This diplomatic approach for resolving tensions between nations has value for resolving conflicts between competing social factions.

In looking for venues for incremental progress, it is helpful to remember that people – including policy makers – are motivated by greed, fear and the desire to touch the hand of greatness. Greed is exemplified by a desire to advance one’s ideological agenda even when there is no real benefit to one’s own group, but only harm to the other party. We see this in ferocious efforts by some advocacy groups to crush dissenters from the current orthodoxy regarding sexuality, often individuals of no real consequence whose dissent threatens little or nothing of the groups’ broader agenda.

Fear, especially fear of failure or domination, may have the salutary effect of pushing otherwise implacable adversaries toward compromise, or it may – as in the case of some religious conservatives – drive them to hold out against clearly justified measures to help LGBT persons, fearing that any concession will trigger an avalanche of major defeats. The Oslo Accords happened because both Israel and the Palestinians feared the costs of continued war more than they feared the loss of their current entrenched positions.

What I call “touching the hand of greatness” consists of an appeal to our highest impulses and to historic opportunities – the chance to do something of lasting importance, to be known as a peacemaker in a time of turmoil. A wise and respected convener can tap these motivations to win the adoption of incremental and progressive measures, assuring the parties that such efforts are part of forging a larger, historic compact to reconcile meaningful protections for LGBT Americans with security for religious freedom and thus establish peace.

E. Simultaneous Action to Protect Both Sides

Each side in the standoff between religious freedom and LGBT rights is too powerful and deeply entrenched to accept unilateral measures. Measures that benefit one side must be fairly matched with measures that favor the other. Protecting LGBT employees from discrimination, for instance, must come with protections for religious employers to select employees who live by the employer’s religious commitments. Like the Utah Compromise, any effort to reconcile these interests

44 See Pizer, Chapter 29, for the importance of decision-making for one’s partner.
45 See Minter, Chapter 4, for the public health crisis facing LGBT youth.
46 For discussion of nondiscrimination law being used as a sword, rather than a shield, see Ryan Anderson, Chapter 27.
must offer a meaningful win for both sides. The Utah experience showed that erstwhile adversaries can work together when there is the potential of mutual advantage. Not only is this win-win approach deeply principled, and therefore maximally defensible, it lays the groundwork for further compromise and agreement. Trust grows as each side gains more from cooperation than from remaining fixed in opposition. Ideally, this principle of mutually beneficial action is the standard to judge any serious effort at resolving the conflicts between religious freedom and LGBT rights.

IV CONCLUSION

The conflict between LGBT rights and religious freedom has been mired too long in the politics of extremes. The country needs a different path forward – a path that begins with the recognition that each side has legitimate claims to legal protection and social recognition. The conference that Professors William N. Eskridge, Jr. and Robin Fretwell Wilson organized, and that I am proud to have participated in, is a hopeful sign that dialogue and ultimately progress are possible, with meaningful engagement among people of good will.

But the conditions must be ripe for that “brave gamble” I have described. We must continue developing shared language for describing the pain and vulnerability experienced by LGBT Americans and religious people and institutions, as well as language to express hope for reconciliation and workable solutions. We must look for collaborative moments as they make their sudden, and at times unexpected, appearance. We must find conveners of stature – those rare statesmen with the capacity for bringing contentious parties together. We must find issues where incremental achievements can build trust and momentum toward further progress. And finally, we must be prepared to insist that solutions benefit both sides – that each side is made more secure in its ability to live according to its deepest convictions and needs. Fairness for all, to be more than a slogan, must be a guiding principle for resolving the manifold conflicts between religious freedom and LGBT rights.

Resolving those conflicts will likely require patient and sustained progress for years to come. The depth and complexity of the conflicts are unlikely to be decided in a single moment. Our federal system offers many opportunities to experiment with different legal frameworks on a state level, to refine them based on experience, and to extend those solutions elsewhere with appropriate adjustments to account for local conditions. The conflicts that divide LGBT Americans from religious Americans are shaped by local politics and culture no less than any other important conflicts in our society.

Most importantly, we should begin not with our grievances in mind but with our commitment to each other and our common humanity. Despite differences, we share a world of similar experiences, aspirations, and hopes. We are sons and
daughters, fathers and mothers, brothers and sisters; we love and worry about our children and grandchildren; we want to live in dignity in communities that are safe and friendly; and we all need places and spaces where we can associate with those who share our deepest convictions. And we are Americans, stewards of a noble constitutional heritage of freedom and equality and heirs of a great, if imperfect, tradition of reconciling profound differences so people can live together in peace. That is a lot for community leaders, elected officials, scholars, lawyers, activists and negotiators – people of good will – to work with. It is the stuff of which durable settlements can be forged. The conditions for peaceful coexistence already exist. Will we have the decency and courage to seize the opportunity that is before us?

“We are not enemies, but friends,” Abraham Lincoln reminded – pleaded – in his First Inaugural. “We must not be enemies. Though passion may have strained, it must not break our bonds of affection.”47 It is “the better angels of our nature” that must inspire us. That advice went unheeded prior to the Civil War. We must heed it now as we reject bumper-sticker extremes on religious freedom and LGBT rights and instead seek a lasting resolution in a genuine pluralism that fosters mutual respect and peace.